SUPREME COURT, U.S.
FILED

93-1029 OCT 26 1993

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IN THE SUPREME COURT OF THE
UNITED STATES

October, 1993 TERM

ELMER T. WILSON, SR. AND MAXINE WILSON
PLAINTIFF - PETITIONER

- against -

UNITED STATES DEPARTMENT OF AGRICULTURE
DEFENDANT

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

1. When the Court of Appeals reviews the Summary Judgment ruling by the District Court, must the facts be viewed in a light most favorable to the non-moving party?
2. Is there a denial of due process when a government agency denies a farmer who is entitled to disaster payments the right to notice of the meeting in which evidence is presented against his claim and the right to cross-examination of pivotal witnesses?
3. Is it a denial of due process when a government agency denies a farmer who is entitled to disaster payments the right to cross-examine pivotal witnesses on whose testimony the agency relies to deny the payments?

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OPINIONS BELOW

The Ruling of the United States District Court, Western District of Louisiana, is unreported and is printed in Appendix C hereto, infra, page 31a.

The Written Opinion of the Fifth Circuit Court of Appeals is reported at 991 F. 2d 1211 (5th Cir. 1993) and is printed in Appendix A hereto, infra, page 1a. The Order of the Fifth Circuit denying petitioner's petition for rehearing is unreported and is printed in Appendix B hereto, infra, page 30a.

STATEMENT OF JURISDICTION

The judgement of the Fifth Circuit Court of Appeals (Appendix A, infra, page 1a) was entered on May 27, 1993. A timely petition for rehearing was denied on July 29, 1993 (Appendix B, infra, page 30a). The jurisdiction of the United States

Supreme Court is invoked under Article 3, Section 2, of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Federal Rule of Civil Procedure 56 is set forth in Appendix I hereto, infra, page 68.

STATEMENT OF THE CASE

Procedural History

Elmer T. Wilson, Sr. and Maxine Wilson, (Wilsons), the plaintiffs in this case, filed suit against Federal Crop Insurance Corporation (FCIC) and Agricultural Stabilization and Conservation Service (ASCS), to recover for monetary damages as a result of damages sustained to the Wilsons rice crop for the year 1988.

Having previously exhausted the administrative process where FCIC had approved a partial loss and ASCS had rejected the request for disaster payments, the Wilsons filed suit in U. S. District Court. The government filed a Motion for Dismissal and in the Alternative for Summary Judgment. The District Court denied the Motion based on

the grounds that there was a genuine issue of material fact remaining as to what constituted good rice farming practices. Subsequently, the government filed a Motion to Alter or Amend Ruling in Judgment, asking the Court to reconsider based on the fact that the Wilsons had not met the time delay with regard to the FCIC claim. The District Court reversed and dismissed the Wilsons claims because of their alleged failure to comply with the applicable notice provisions in the FCIC contract. However, the Order stated only that the Court was dismissing the government's claim. (Petitioner's Appendix C)

The Wilsons appealed to the Fifth Circuit Court of Appeals.[1] The Court of

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[1] Wilson v. U. S. Dept. of Agriculture, 991 F.2d 1211 (5th Cir. 1993).

Appeals held that summary judgment as to FCIC was inappropriate and reversed that ruling.[2] The Court of Appeal reviewed the District Court action as if it had granted a Summary Judgment in favor of ASCS and affirmed that ruling.

The Wilsons petition this Honorable Court for Writs of Certiorari to review the decision of the Fifth Circuit Court of Appeal regarding the claim against ASCS.

FACTS

The pertinent facts surrounding the request for disaster payments from ASCS are as follows. ASCS would not address the request for disaster payments until FCIC made their final determination. When they did finally decide to address the issue,

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[2] This petition for Writs of Certiorari does not address the FCIC claim as it was appropriately reversed.

there were three important ASCS meetings regarding the Wilsons' claim.

On May 24, 1990, there was an ASCS hearing in which the testimony of Rodney Ewing and FCIC employees was presented against the Wilsons' claim. The Wilsons were not informed that the testimony of these people would be presented. Moreover, the Wilsons were not given any notice of the meeting. (Petitioner's Appendix F)

The Wilsons then requested a hearing and it was held on June 28, 1990. At this meeting, various rice farmers were present to testify concerning the proper rice farming practices. All of the farmers informed the committee that the farming practices used by the Wilsons were proper rice farming practices. None of the ASCS board members had any experience in rice

farming. At this meeting, the committee did not produce any witnesses adverse to the Wilsons. (Petitioner's Appendix G).

On July 10, 1990, the ASCS held another meeting and Ernest Armstrong and Leonard Terrell, both FCIC employees, were present and gave testimony against the Wilsons' claim. (See Petitioner's Appendix H) Again, neither the Wilsons nor their attorney was present. At no time were they informed of this particular meeting, nor were they given the opportunity to counter the testimony given by Mr. Terrell.

The Wilsons did <u>not</u> have numerous opportunities to present evidence to the committees, as the government's brief to the United States Court of Appeal erroneously states. The only committee meeting which the Wilsons were given

notice of was the one which was requested by them. Furthermore, the committee did not present any adverse evidence at this meeting. The only time that evidence was presented against the Wilsons claim was at the ASCS hearings where the committee met behind closed doors with the FCIC employees. The Wilsons were not given an opportunity to present their own evidence to meet the evidence of those adverse to their claim. Neither were they given opportunity to cross examine them. Furthermore, they were not even informed that the testimony of the FCIC employees would be presented. Moreover, they were not given any notice of the meetings.

SUMMARY OF THE ARGUMENT

The Wilsons respectfully submit that there is no basis for treatment of the trial court judgment as a Summary Judgment

in favor of ASCS. The Order dismissing the claim against the government stated that it was based on the Written Reasons. Those Written Reasons dealt only with the FCIC claim and not with the ASCS claim. When the District Court does not set forth the relevant facts with respect to the merits of the claim, Summary Judgment is not appropriate.

Even assuming the Summary Judgment ruling was properly before the Court of Appeals, all facts should have been viewed in a light most favorable to the non-moving party, the Wilsons. It is well established that in considering a Motion for Summary Judgment, the Court must review the facts drawing all inferences in favor of the party opposing the Motion. The Wilsons were not afforded this procedural presumption and indeed all

presumptions were against the Wilsons and in favor of the ASCS. The U.S. District Court had previously made it very clear that it was convinced that there was a genuine question of material fact remaining as to what constituted good rice farming practices. The court never changed its mind on this issue. However, the Court of Appeals viewed the facts in a light most favorable to ASCS and ruled in its favor. The Wilsons contend that they are entitled to a trial on the merits of this case. The Court of Appeals used the wrong standard of review in its consideration of this matter.

The Wilsons contend that they have a property interest in the payments which were denied by the government and their due process rights were violated. The Wilsons were not given notice of the

meetings where evidence was presented against them. The ASCS's denial of the cross-examination of the witnesses is a violation of due process in a case where a property interest is at stake. The Wilson's contend that the agency discretion is subject to abuse to a much greater extent than allowed by the Court of Appeals.

ARGUMENT

I. The Court of Appeal used the wrong standard review.

A. There was no basis for Summary Judgment in favor of ASCS.

After the administrative remedies had been exhausted, the Wilsons filed suit in the Western District Court of Louisiana. Subsequently, the government filed a Motion for Dismissal and in the Alternative for Summary Judgment. The government claimed that there was a lack

of subject matter jurisdiction because the Wilsons had not filed a timely notice of loss. The District Judge entered a Judgment denying the Motion stating that the Court was convinced that there was a genuine issue of material fact remaining as to what constituted good rice farming practices and the ten (10) day notice was waived by FCIC.[1] The government filed a Motion to Alter or Amend Ruling in Judgment asking the Court to reconsider and amend its Judgment and grant the government's Motion to Dismiss. This Motion to Alter was based solely on the allegations that the Wilsons failed to present written notice of loss within ten (10) days as required by the statute. The

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[1] Although this petition does not deal with the claim against the FCIC, this background is necessary to show that the Court of Appeals used the wrong standard of review with regard to the ASCS claim.

District Court reversed and dismissed the Wilsons claims because of their alleged failure to comply with the applicable notice provisions. However, the Order stated only that the Court was dismissing the government's claims for the assigned Written Reasons. The written ruling made no mention that it was reversing its course as to ASCS. In fact, the Court made it very clear as to the reasons it was reversing when it stated:

> This Court, in its ruling dated 13 April, 1992 decided that because the time limits of the loss was not raised at the administrative level, the government should, in all equity, be barred from raising the issue at the Federal Court level. Upon careful reflection and review of the applicable regulation, this Court must amend its prior Judgment and conclude that the failure of the Wilson's to comply timely with the ten day deadline bars their recovery under the insureds policy.

The Court did not give any other reasons.

The Court did not state that it was wrong

as to the ASCS dismissal. It only stated that it was wrong as to the "insurance policy"-the contract between the Wilsons and FCIC. Nothing was stated to indicate any facts or law was presented to this court to change its opinion in its original ruling against ASCS.

On appeal to the Fifth Circuit Court of Appeals, the action was reviewed "as if the Court granted Summary Judgment in favor of the government, because the Court looked beyond the pleadings in reaching its decision."[1] The Fifth Circuit stated:

> As a preliminary matter, we determine that we do have before us *both* the claim on the FCIC insurance contract and the claim against ASCS for denying disaster payments. There appear to be some confusion surrounding the status of the ASCS claim.
>
> * * *

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[1] Wilson v. U. S. Department of Agriculture, 991 F. 2d 1211 (5th Cir. 1993).

Appellant's Notice of Appeal recognizes the District Court's actions as affecting the final judgment against their claims.

The Fifth Circuit went on to dismiss all the claims against ASCS and reverse and remand the dismissal of the claims against the FCIC, stating that there were questions of material fact which made the Summary treatment inappropriate.

Contrary to the Fifth Circuit Court of Appeal's statement in its opinion, the Wilsons', Notice of Appeal does not recognize the District Court's actions as effecting a final Judgment against the claimants. Rather, it was expedient that the Wilson address this issue since the Order and Written Reasons were obfuscating as to the scope of the Judgment. The wilsons could not assume that ASCS was not included within the four corners of the Judgment.

No mention was made in the Motion to Alter that the original denial of the Motion to Dismiss by ASCS was wrong. No mention was made in the Order or Written Reasons of the District Court that the denial of the Motion to Dismiss by ASCS was wrong. Even the government's original brief to this Court stated that "the District Court failed to make specific findings on the disaster payment claim." (See Appellee's Brief pg. 23)

Under Rule 56 of the Federal Rules of Civil Procedure, Summary Judgment is not to be granted unless there is no genuine issue as to any material fact and the moving party is entitled to Judgment as a matter of law. When the District Court does not set forth the relevant facts or the law with respect to the merits of the claim, Summary Judgment is not

appropriate. Carter v. Stanton, 405 U. S. 669, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972). In Carter, the Court considered an action for declaratory and injunctive relief in which it was contended that the state welfare regulation in governing eligibility for Aid to Dependant Children contravened the Fourteenth Amendment and the Social Security Act. The District Court dismissed the action at the hearing on a Motion to Dismiss. The United States Supreme Court stated that the Court was required to treat the Motion to Dismiss as one for Summary Judgment because matters outside the pleadings were presented and not excluded by the Court. This Honorable Court stated:

If this is the course the District Court followed, its Order is opaque and unilluminating as to either the relevant facts or the law with respect to the merits of the appellant's claim. In this posture of the case, we are unconvinced

that Summary Judgment was properly entered. The Judgment of the District Court is therefore vacated and the case is remanded to that Court for proceedings consistent with this opinion. (Emphasis Supplied)

In the instant case, there was no determination made as to the ASCS in the Written Reasons. There was no finding of fact or law related to ASCS in the Written Reasons. ASCS was simply included in "the government." This case should be remanded to the District Court. The Wilsons are entitled to a trial on the merits.

B. **The Court of Appeals erred when it viewed the facts in a light most favorable to the ASCS and not to the non-moving party, the Wilsons.**

It is a well established principle that when considering a Motion for Summary Judgment, the Court must review the facts drawing all inferences in favor of the party opposing the Motion. Washington v. Allstate Insurance Company, 901 F. 2d 1281

(5th Cir. 1990). In this case, the Wilsons were not afforded this procedural presumption. Indeed, all presumptions were against the Wilsons and in favor of ASCS.

In Poller v. Columbia Broadcasting Systems, Inc., 82 S.Ct. 486, 368 U.S. 464, 7 L.Ed.2d 458 (1962), the United States Supreme Court ruled that Summary Judgment should not be granted unless the truth is clear. Mr. Justice Clark speaking for this court, made these comments:

> This rule authorized Summary Judgment "only where the moving party is entitled to Judgment as a matter of law, where it is quite clear what the truth is, * * * [and where] no genuine issue remains for trial* * *
> [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Sartor v. Arkansas Natural Gas Corp.,321 U.S. 620,627,64 S.Ct. 724, 728,88 L.Ed.2d 1967 (1944).

* * *

We look at the record on Summary Judgment in the light most favorable to Poller, the party opposing the Motion, and conclude here that it should not have been granted.

Instead of affording the Wilsons the procedural presumption provided for in a Motion for Summary Judgment, the Fifth Circuit Court of Appeals weighed what little evidence was available in favor of the government. To review the decision of the District Court as a Summary Judgment in favor of ASCS was error. Moreover, to review it under the wrong standard of review in favor of the government is error of the most egregious nature. In the District Court's original ruling on the Motion for Summary Judgment, it ruled that the Summary Judgment was inappropriate making the following comments:

In their Motion, the defendants argued that the remaining sixty (60) percent loss was uninsurable under the provisions under the policy because the Wilsons engaged in

poor farming practices. At the 28 June, 1990 ASCS hearing, all the defendant's witnesses agreed that the plaintiff's "levees were not butted and the rice was not flushed." They concluded that the failure to do either of these was poor farming practice. Mr. Wilson, a rice farmer since 1956, along with other rice farmers from the area disputed the contention that flushing the rice and butting the levies were the only proper methods of farming rice. After review of the ASCS hearing transcript, this Court is convinced that there is a genuine question of material fact as to what constitutes good rice farming practice in this case. The defendant's Motion for Summary Judgment is denied. (emphasis supplied)

When the District Court reversed its original decision, its Order stated that it was doing so for the Written Reasons assigned. In the Written Reasons, the only issue that the Court addressed was that the Wilsons did not timely file their claim with the FCIC. It did not reverse its decision as to the material issue concerning farming practices, the issue which is crucial in the ASCS claim. As can be seen, the Fifth Circuit did not

view the evidence in the light most favorable to the Wilsons, as required by the Federal Rules and the jurisprudence. The inferences were not drawn in favor of the Wilsons. Indeed, there was more than the slightest doubt remaining as to the evidence presented. The District Court made that very clear when it stated that it was convinced that there was a genuine issue of material fact as to what constituted good rice farming practices. As the United Stated Supreme Court made very clear in Poller, supra, the purpose of the Summary Judgment is not to cut litigants off from their rights of trial by jury. However, this is exactly what will happen if this Petition for Writs of Certiorari is denied.

The Wilsons contend that they are entitled to a trial on the merits of this case.

II. Due Process was Violated.

A. The Wilsons have a property interest.

The Fifth Circuit Court of Appeal ruled that the Wilsons failed to identify a property interest which is protected by the Fifth and Fourteenth Amendments of the Constitution. This was supposed to somehow justify the fact that the Wilsons were not notified of the meetings that ASCS held in which evidence was presented against them. However, the United States Supreme Court has spoken to this issue in Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S. Ct. 1148, 701 L.Ed. 2d 265 (1982). In that case, this Court said that the hallmark of property is an individual entitlement which cannot be

removed except for cause. The Wilsons argue that their case falls within that definition. In the well established case of Goldberg v. Kelly, 397 U.S. 259, 90 S.Ct. 1011 (1970), a case dealing with the termination of welfare benefits, this Honorable Court dealt with the property interest question. In footnote 8 the court made the following comments:

It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that:

> [s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for

> airlines and channels for television stations..."(emphasis supplied, citations omitted)

Some twenty-three (23) years after Goldberg, this interest is even clearer. It is no secret that federal farm programs contribute significantly to the overall farm economy. Approximately seventy five percent (75%) or more of the nation's wheat, cotton, rice, and feed grain acreage has been enrolled in a federal farm program over the last few years.[5] In 1992, the percentage of base acres of rice enrolled nationwide was 93%.[6] In recent years, when the farm program enrollment was very high, the payments often constituted a substantial portion of the

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[5] Malasky, Kelley and Schneider, *Resolving Federal Farm Program Disputes: Recent Developments*, 19 William Mitchell Law Review 284 (1993).

[6] Id.

net farm income. "[I]n 1987, when nationwide enrollment peaked above ninety percent for corn, rice, and cotton and at eighty eight percent for wheat, program payments to Indiana farmers accounted for seventy four percent of their net farm income." With this in mind, it is interesting to consider that should the government have confiscated the Wilsons crop, it would have had to have compensated the Wilsons under the eminent domain doctrine. The Wilsons would be entitled to this compensation because it is their crop. They depend on this crop for their income. In the instant case, when it is considered that the payments which farmers are entitled to often constitute a substantial portion of their

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[7] Id. at 285.

net farm income, the result is the same because net farm income is affected.

The Wilsons strongly contend that they have a property interest in the ASCS disaster payments. To deny these payments which they are legally entitled to is to adversely and substantially affect their net farm income.

B. **ASCS failed to give proper notice.**

In its brief to the Fifth Circuit, the government said that the Wilsons received all of the "process" to which they were entitled. They further stated that "due process...does not always require advance notice of a hearing." (citing Darlak v. Bobear, 814 F. 2d 1055 N.9 (5th Cir. 1987). Darlak is clearly distinguishable in that it was referring to a notice of a meeting with an

investigator before the actual full-blown hearing. This meeting was not even a hearing as such. In our case, there were three hearings in question. At both the first and the last hearing, there was evidence or testimony presented adverse to the Wilsons claim. It is this evidence and testimony on which the government depends for its case against the Wilsons. The Wilsons were not given an opportunity to meet the evidence with their own evidence. They were not even given the opportunity to cross examine the witnesses. Furthermore, they were not even given notice of these meetings. The only meeting that they were given notice of was a hearing that they requested themselves. There is not one shred of evidence to show that they were at either of these other meetings or that they were

given notice of either of these meetings. Indeed, these were the meetings in which the testimony was presented against their claim. At the meeting that they were given notice of, there was no evidence presented against them.

This United States Supreme Court has consistently held that "some form of a hearing is required before an individual is finally deprived of a property interest." Matthews v. Eldridge 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 18 (1976). This Honorable Court stated in Matthews that the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." (quoting from Armstrong v. Manzo, 380 U.S. 545, 85 S. Ct. 1187, 14 L.Ed. 2d 62 (1965).) There is no way around the United States Constitution.

There is no way around the clear language of these cases. There is no way around fundamental fairness. "Meaningful" does not mean that it is permissible for two government agencies to conduct "hearings" behind closed doors and present all the evidence without giving the Wilsons notice. The Wilsons were not given an opportunity to be heard in a meaningful time and in a meaningful manner.

C. **The Wilsons were denied the opportunity to cross-examine witnesses and counter evidence.**

The Wilsons were denied the opportunity to cross examine the pivotal witnesses in this case. In Doty v. U.S., 24 Cl. Ct. 615 (1991), the agency failed to grant a dairy farmer's request to cross examine his herdsman during an administrative appeal process. In that

case, the court made the following comments:

In this case, Doty's attorney repeatedly requested that Seikmann and the ASCS spot checker, Steven Gnivffke, be present to testify both at a state level hearing and before DASCO. This request was never granted. In addition, neither the state committee nor DASCO allowed Doty the opportunity to cross examine Seikmann, whose testimony formed the basis for DASCO's denial of Doty's appeal. In a case such as this where there are conflicting versions of facts and testimony which is in direct conflict, in order to discern the truth as accurately as possible, Agency's discretion to permit or deny cross examination of pivotal witnesses is subject to abuse to a much greater extent than in most other aspects of informal hearings.
We find that DASCO's refusal to call Seikmann as a witness and to allow Doty to question him before the decision-makers was an abuse of the discretion granted by the CFR Section 780.8 (c).

* * *

Our holding is limited to the special circumstances in this case in which DASCO relied on the second version of events by a single witness with a possible motive to harm the participant when all other statements of persons with direct knowledge of relevant events were consistent with the participant's version of events and with the initial version of

this single witness. (emphasis supplied, citations omitted)

This holding was limited to the special circumstances which correspond to the circumstances in the instant case. In the instant case, the agency relied on the second version of events found in an affidavit by a county agent when all other statements of numerous farmers with direct knowledge of the relevant events were consistent with the Wilsons' version of the events. Again, this agency discretion is subject to abuse to a much greater extent than allowed by the Fifth Circuit Court of Appeals.

In Goldberg, supra, the court dealt with the situation where the recipient was not permitted to present evidence to the official orally or to confront or cross examine adverse witnesses. This court stated that "[t]hese omissions are fatal

to the constitutional adequacy of the procedures." The Supreme Court went on to state:

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine adverse witnesses. What we said in Green v. McElroy, is particularly pertinent here:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is where governmental actions seriously injure an individual, and the reasonableness of the actions depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross examination. They have ancient roots...this court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases,...but also in all types of cases where

administrative...actions were under scrutiny. (emphasis supplied)

It is abundantly clear from the jurisprudence that an agency cannot deprive a person with a property interest without giving him an opportunity to rebut evidence given at the hearing.

With regard to the ASCS hearings on May 24, 1990, when the Wilsons were not informed that the testimony of Rodney Ewing and the FCIC employees would be presented, and were not notified about the meeting, they were not able to counter the testimony by Rodney Ewing or to cross examine Mr.Ewing. Again, on July 10, 1990 the ASCS committee met without notifying the Wilsons or their attorney. FCIC employees were present at that meeting. The Wilsons should have been given the opportunity to cross examine these pivotal witnesses. Many questions will remain

because the Wilsons were not allowed to cross examine the witnesses at this hearing. A hearing wherein FCIC officials and the ASCS parish committee members meet and FCIC tells the committee to deny the Wilsons claim smacks of collusion, and "meetings behind closed doors," all in violation of the Wilsons' constitutional rights. Furthermore, the FCIC employees were advising ASCS to deny the claim even while the FCIC at the national level had reversed a decision at the district level. Knowing his superiors granted forty percent (40%) insurable causes of loss, Terrell advised denial of the entire claim. Why did he not advise ASCS to recognize forty percent (40%) of the disaster claim? This question will remain unanswered if the Court of Appeals decision is upheld.

Clandestine meetings between FCIC and ASCS does not engender respect for rules and regulations but rather causes great concern for any citizen affected. How can the average American citizen fight such an apparent attempt by FCIC and ASCS to deny his opportunity to confront those who testify against him? The judicial system is the average American citizen's only recourse and if this is removed, then no hope remains for any farmer against whom such a conspiracy is made. Justice is forsaken and denied. The blindfold is removed and the scales of justice tilted to the government-the all powerful sovereign.

The Wilsons were denied the right to cross examine witnesses, and the right to present evidence contrary to the testimony

presented by others. Surely an agency of the United States cf America cannot deny due process to an American farmer by hearing testimony affecting his property rights without giving an opportunity for him to cross examine witnesses or to present testimony to rebut the testimony of adverse witnesses.

CONCLUSION

The Summary Judgment which was decided by the lower court should not have included ASCS and therefore the claims of ASCS were not properly before the Fifth Circuit Court of Appeals. Even assuming *arguendo* that the Motion for Summary Judgment was properly before the Court of Appeals for review, the Wilsons, the non-moving parties, were not afforded the procedural presumption required for review

of a Summary Judgment. The wrong standard of review was used.

The Wilsons further contend that the ASCS failure to notify them of important meetings and denial of the opportunity of cross examining the crucial witnesses upon which the decision was based is a violation of their due process rights. The ASCS agency discretion is subject to abuse to a much greater extent than afforded by the Fifth Circuit Court of Appeals.

The Wilsons respectfully request that this Petition for Writs of Certiorari be granted.

Respectfully submitted,

John Hoychick, Jr.

Attorney for Elmer T. Wilson and Maxine Wilson

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4969
Summary Calendar

ELMER T. WILSON, SR. AND MAXINE WILSON,
Plaintiffs-Appellants

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendant-Appellee

WRITTEN OPINION

Appeal from the United States District Court for the Western District of Louisiana, F. A. Little, Jr., District Judge presiding

Submitted May 27, 1993
Alexandria, Louisiana

Before: JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

DUHÉ, Circuit Judge:

Rice farmers appeal the decisions of two administrative agencies within the Department of Agriculture. The district court dismissed Appellants' claim against the Federal Crop Insurance Corporation (FCIC), concluding that Elmer Wilson (Wilson) failed to give timely notice of his crop loss as required by the insurance policy. The court also dismissed the Wilsons' claim against the Agricultural Stabilization and Conservation Service (ASCS), an agency that denied them disaster payments following their crop loss. We affirm the district court's decision dismissing all claims against the ASCS. We reverse and remand the dismissal of the claims against the FCIC, as there

are questions of material fact which make summary treatment of this matter inappropriate.

I. *Background*

In the spring of 1988 the Wilsons planted rice on 1,013 acres of land. A little rain fell immediately after planting was completed in May, but a drought ensued and the seed did not germinate according to schedule. In June, the Wilsons attempted to flush their fields by saturating them with water from a nearby river. Unfortunately, torrential rains in July flooded their farm. Fearing that he suffered some partial crop damage, Mr. Wilson telephoned the insurance agent who obtained federal crop insurance for him on his 1988 rice crop.[1] She alerted

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[1] For a discussion of the Federal Crop Insurance Corporation's operations, see *Berry v. United States*, 766 F.2d 886,888-

agents form the FCIC, and adjusters from that agency inspected the Wilsons' property on at least two occasions.

In August 1988, an FCIC agent prepared a "Field Inspection and Claim for Indemnity" form, which Mr. Wilson signed. It stated the date of damage as "May," and the date of notice as July 11, 1988. This report also listed the cause of the crop loss as "1 inch rain on or about 23 May '88 [that] caused the seed to germinate, swell, and sour or ruin." FCIC employees determined that the Wilsons' 1988 rice crop was a total loss. The Wilsons maintain that they did not consider the crop a total loss until August 23, 1988,

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89 (5th Cir. 1985). The applicable regulations governing the FCIC insurance contract in the instant case are found a 7 C.F.R. § 401.8 (1988). These regulations are binding on the insureds and set forth the terms of the insurance contracts. *Berry*, 766 F.2d at 889.

when the FCIC agents presented the "Field Inspection and Claim for Indemnity" form for Mr. Wilson's signature.

Based on its agents' conclusions that improper farming practices, and not adverse weather conditions, caused the crop loss, the FCIC rejected the Wilsons' claim for indemnity under the crop insurance contract. *See* 7 C.F.R. § 401.89(d)1.b ("We do not insure against any loss caused by: ...(2) The failure to follow recognized good farming practices for the insured crop"). At the national level of the administrative appellate process, the FCIC recanted slightly, and agreed that 40% of the Wilsons' crop loss was attributable to covered causes. When the administrative remedies were exhausted, the Wilsons sued in federal district court. *See* 7 U.S.C. § 1508(c)

(1988) (preserving judicial review) (current version at 7 U.S.C. § 1508(f) (Supp.1993)).

During the FCIC proceedings, the Wilsons applied for disaster payments from the ASCS. The ASCS makes such payments to qualified applicants who are "unable to harvest at least 65 percent of the expected production..." 7 C.F.R. § 1477.5(a)(3)(iii)(1989). Initial determinations of eligibility are made by an ASCS count/parish committee. An applicant dissatisfied with a local committee's decision may appeal up the administrative chain. *See* 7 C.F.R. § 780.3-.5 (1989); *see generally Raines v. United States*, 12 Cl.Ct. 530, 532 n. 1 (1987) (outlining appellate process for ASCS decisions). Once administrative

appeals are exhausted the applicant may sue. *See* 15 U.S.C. § 714(c) (1988).

The Wilsons' application for disaster payments was denied by the local ASCS Committee on May 24, 1990. Testimony from the County Agent convinced the committee that the Wilsons did not employ necessary farming practices and that this caused their crop loss. (Affidavit of Robert Bradley, former Executive Director, local ASCS Committee). The Wilsons protested this decision, and presented rebuttal evidence at a June 28, 1990 local ASCS Committee meeting. The Wilsons were accompanied by their attorney, and six local rice farmers who testified that the Wilsons had, in their opinion, used reasonable farming practices in caring for their 1988 rice crop.

Another hearing was held on July 10, 1990, during which the local ASCS Committee heard testimony from an FCIC agent. the committee also received information from the Army Corps of Engineers regarding rainfall amounts for July 1988; these amounts were lower than the figures provided by the Wilsons' earlier testimony. The local ASCS Committee concluded that its previous decision to deny disaster payments was proper, and despite the Wilsons' experience and knowledge regarding rice farming, they failed to carry out practices which were reasonably necessary to insure expected crop production. The state ASCS committee agreed. The Wilsons then sued.

The government moved to dismiss the Wilsons' claims under Rules 12(b)(1), (2),

or (6); and alternatively, for summary judgment, under Rule 56. In this motion, the government urged for the first time that the Wilsons failed to give proper notice as required under the FCIC insurance policy.[7] The court initially denied the government's motion, stating that "This argument should have been made during one of the many administrative hearings and prior to the FCIC decision to

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[7] 7 C.F.R. § 401.8(d)8.a.(4) (1988) provides: [I]f you [insured] intend to claim an indemnity on any unit, a notice of loss must be given not later than 10 days after the earliest of:

> (a) Total destruction of the insured crop on the unit;
> (b) Harvest of the unit; or
> (c) The calendar date for the end of the insurance period.

Additionally, all required notices must be presented in writing. 7 C.F.R. § 401.8(d)20. Failure to fulfill the notice requirements acts as a bar to recovery under the FCIC contract of insurance. *See, e.g., Mock v. United States*, 183 F.2d 174 (10th Cir.1950); *Spratlin v. FCIC*, 662 F.Supp. 870 (E.D.Ark.1987); *Byrne v. FCIC*, 289 F.Supp. 873 (D.Minn.1968).

award the plaintiffs partial recovery." R. 97. The district court, after the government filed a motion for reconsideration, reversed course and dismissed the Wilsons' claims because of their failure to comply with the applicable notice provisions. R. 152-53.[1]

II. *Standard of Review*

The Appellee asked the trial court for alternative relief: (1) Summary judgment, Fed.R.Civ.P. 56; or, (2) dismissal for lack of subject matter jurisdiction, personal jurisdiction, or

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[1] The FCIC insurance policy's notice requirements do not apply to ASCS claims. The district court's dismissal order, however, did not distinguish between the two claims. Nevertheless, we review the claims separately: The FCIC action is, at bottom, an insurance contract dispute, while the denial of ASCS disaster payments is an administrative agency's decision. *See* discussion *infra*, at note 5.

for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(1), (2), and (6). The district court's order state only that the court was dismissing the Appellants' claims. R. 154. We will review this action as if the court granted summary judgment in favor of the government, because the court looked beyond the pleadings in reaching its decision:[4]

> If, on a motion asserting the defense numbered (6) to dismiss for failure

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[4] The basis for the dismissal, the Wilsons' untimely notice, was premised on the dates listed in the "Field Inspection and Claim for Indemnity" form. This document was not attached to either the complaint or the government's answer, rather it was attached to the government's motion for dismissal or summary judgment. *See* R. 38. Consequently, the form was outside of the pleadings presented. *See* Fed.R.Civ.P. 7(a) ("There shall be a complaint and an answer; a reply to a counterclaim denominated as such....No other pleading shall be allowed[.]").

> of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56....Fed.R.Civ.P. 12(b).

We will affirm a grant of summary judgment "where 'we are convinced, after an independent review of the record, that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Hartford Acc. & Indem. v. Costa Lines Cargo Serv.*, 903 F.2d 352, 362 (5th Cir.1990) (quoting *Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States*, 832 F.2d 1358, 1364 (5th Cir.1987)) (internal citations omitted).

The Wilsons argue that the ASCS decision was arbitrary and capricious, and that the manner in which the ASCS reached its decision deprived them of due process protections. We address this point of error, along with the claim against the FCIC, in turn.[1]

III. *ASCS Disaster Payments*

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[1] As a preliminary matter, we determine that we do have before us *both* the claim on the FCIC insurance contract, and the claim against ASCS for denying disaster payments. There appeared to be some confusion surrounding the status of the ASCS claim. The government's motion to dismiss was premised on the FCIC insurance contract and applicable federal regulations; the 10-day notice requirement does not apply to the claim against the ASCS. However, when the district court granted the Appellee's motion, it spoke in terms broad enough to encompass all causes of action: "[P]laintiffs' *claims against the defendant* are DISMISSED with prejudice." R. 154 (August 25, 1992 Judgment of District Court) (emphasis added). *See* 28 U.S.C. § 1291 (1988); Fed.R.Civ.P. 58. Appellants' notice of appeal recognizes the district court's actions as effecting a final judgment against their claims. R. 159.

A. *Administrative Review*

ASCS decisions are subject to narrow judicial review: We look at the agency's decision to determine if it was reached in an arbitrary or capricious manner. *See Madsen v. Dept. of Agric.*, 866 F.2d 1035, 1036 (8th Cir.1989); *Westcott v. Untied States Dept of Agric.*, 611 F.Supp. 351, 353 (D.Neb.1984), *aff'd*, 765 F.2d 121 (8th Cir.1985); *King v. Bergland*, 517 F.Supp. 1363, 1365 (D.Colo.1981). A decision is arbitrary or capricious "only when it is 'so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Gibson v. United States*, 11 Cl.Ct. 6, 15 (1986) (quoting *Motor Vehicle Mfg. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983)). The agency decision need only

have a rational basis, and it does not have to be a decision which the court would have made. *Id.* The local ASCS committees make initial evaluations of eligibility for disaster payments: "The county committee determines that because of an *eligible disaster condition*..." the applicant was unable to harvest his expected yield. 7 C.F.R. § 1477.5(a)(3) (1989) (emphasis added). An "eligible disaster" is defined as "damaging weather, including but not limited to drought, hail, excessive moisture, freeze, tornado, hurricane, or excessive wind, or any combination thereof[.]" *Id.* at § 1477.3(f). The local ASCS Committee concluded that improper farming practices, not an eligible disaster condition, were responsible for the Wilsons' crop losses. There is sufficient evidence in the

administrative record to support this conclusion.

There were three hearings before the local ASCS Committee. Evidence was taken from, among others, the local county agent, Rodney Ewing, and FCIC agent Leonard Terrell. Terrell recounted for the Committee what he observed during his August 1988 visits to the Wilsons' farm. The lack of "gates" on the Wilsons' levees indicated to Terrell that the fields could not have been adequately flushed.

Ewing testified regarding his July 25, 1988 inspection. He reported seeing stands of rice that were only four to six inches tall. The Committee referred to Extension Service materials on rice production which indicated that rice correctly planted in mid-May and cared for in the proper manner should have been

approximately fourteen inches high by the time Ewing visited the Wilsons' farm in late July.

The Wilsons presented testimony in support of their position. During the June 28, 1990 meeting of the committee, six local farmers testified on the Wilsons' behalf. The committee questioned these witnesses, and was able to draw from their experiences as rice producers.

Based on all the information it received, the local ASCS Committee concluded that the Wilsons did not employ the necessary farming practices required to make a rice crop. (Affidavit of Robert Bradley, former Executive Director, local ASCS Committee). This conclusion is not "'so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Gibson v.*

United States, 11 Cl.Ct. 6, 15 (1986) (quoting *Motor Vehicle Mfg. Ass'n v. State Farm Mutual*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983)). Furthermore, there is ample evidence in the record to support the ASCS's judgment. We are unpersuaded that the ASCS decision is arbitrary or capricious.

B. *Due Process Concerns*

The Wilsons maintain that their fundamental right to due process was violated because they were not permitted to fully participate in the decision making process. Specifically, they argue that the local committee did not inform them of meetings when their disaster application was being considered. The committee, in the Wilsons' absence, heard testimony from Rodney Ewing and later Leonard Terrell. The Wilsons contend that

they should have been permitted the opportunity to cross-examine these witnesses.

Absent an identifiable property interest, the Appellants cannot argue they were denied due process. *See Board of Curators v. Horowitz*, 435 U.S. 78, 82, 98 S.Ct. 948, 951, 55 L.Ed.2d 124 (1978); *Mahone v. Addicks Util. Dist. of Harris County*, 836 F.2d 921, 929 (5th Cir.1988). In the instant dispute, the Wilsons contend that they have a property interest in receiving disaster payments. This is incorrect: "The mere fact that a government program exists does not give a person a property interest in participating in the program." *Westcott*, 611 F.Supp. at 359; *see also Mahone*, 836 F.2d at 930 (property interests are

created by existing contract, statue, or mutually recognized entitlement).[6]

To participate in the ASCS disaster payment program, applicants must make a threshold showing of eligibility, *i.e.* that their loss was caused by an "eligible disaster." The Wilsons presented evidence in support of their position, but the local ASCS committee concluded that the Wilsons' losses was due to improper farming techniques. We held, as explained above, that this decision is not arbitrary or capricious, and is adequately supported by the administrative records. There is

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[6] *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), a case relied on by the Appellants, is readily distinguishable. Eldridge had his *previously* award social security benefits terminated, and the Court ultimately held that he was not entitled to a pre-termination evidentiary hearing. *Id.* at 340-41, 96 S.Ct. at 905. If anything, this case cuts against the Appellants' position.

not deprivation of due process under the facts of this case. *Cf. Westcott*, 611 F.Supp. at 359 ("It appears that the plaintiff may not have been informed of one of the county committee meetings at which his farms were discussed, but he was able to present his views at all levels of the agency's determination process.")

IV. *FCIC Claim*

The district court's decision to dismiss the Wilsons' claims against the FCIC rested on the failure of the Appellants to comply with the notice requirements of their FCIC insurance contract. *See supra* note 2 (applicable regulations cited). As these regulations have the force of law, we review their application *de novo*. *See FCIC v. Merrill*,

332 U.S. 380, 385, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947).

The FCIC regulation cited by the government, and relied upon by the district court, requires that an insured who intends to claim an indemnity on any covered acreage give a notice of loss "not later than 10 days after the earliest of : (1) Total destruction of the insured crop on the unit; (2) Harvest of the unit; or (c) The calendar date for the end of the insurance period." 7 C.F.R. § 401.8(d)8.a.(4) (1988). Only the first triggering event, the total destruction of the insured crop, is relevant to the present dispute.

The Wilsons contend they never claimed that their 1988 rice crop was a total loss. Rather, this was the conclusion that the FCIC reached, and Mr.

Wilson was first alerted of the agency's position when he signed the "Field Inspection and Claim for Indemnity" form on August 23, 1988. Since the FCIC made the determination which triggered the notice requirement (total crop loss), the Wilsons argue that notice was properly given when he signed the form on August 23, 1988.

The FCIC takes a contrary view, and urges that the time for notice began to run before their agents determined the rice crop was a total loss. The FCIC points to the dates listed on the "Field Inspection and Claim for Indemnity" from and contends that these are the date(s) which trigger the time for giving notice. On the inspection report, the "Date of Damage" is listed as "May," and the "Date of Notice" is given as July 11, 1988. An

accompanying notation indicates that the primary cause of the crop loss was an inch of rain which fell on May 23, 1988 and caused the rice seed to "germinate, swell and sour or ruin." Even using July 11, 1988 as the triggering date, the FCIC maintains that the August 23, 1988 inspection report does not satisfy the ten day notice requirement.

The issue appears to be fairly pedestrian: Notice is to be given within ten days of the date of total crop loss. The FCIC's argument implies that insureds should provide notice immediately after a potential damaging event, *e.g.* heavy rains. Consequently, the date of the event would start the ten-day clock running. However, this could likely inundate local administrators with notices sent by farmers out of an abundance of

caution.[7] Appellants urge that something akin to the discovery rule should apply. Under this argument the notice period only starts to run when the insured actually discovers a loss, which can occur long after the flood waters have receded. This approach is also problematic, in that it runs contrary to regulations calling for advance notice of potential claims. *See* 7 C.F.R. § 401.8(d)8 (1988).

We generally defer to an agency's interpretation of its own regulations and procedural rules. *See Citizens for Fair Util. Regulation v. N.R.C.*, 898 F.2d 51, 54 (5th Cir.), *cert. denied*, 498 U.S. 896, 111 S.Ct. 246, 112 L.Ed.2d 205 (1990). We cannot do so in this matter, however, as

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[7] This approach also disregards the fact that crop loss may not be apparent until well after the damaging event has passed.

the FCIC has put forth two positions that are at loggerheads with each other.

First, the FCIC contends that the regulations are unambiguous, and that notice must be given when the crop is totally destroyed. The agency argues that the Wilsons' triggering event-total crop less-should be determined by looking at the dates the Wilsons entered on the August 23, 1988 "Field Inspection and Claim for Indemnity" form. In the next breath, however, the FCIC posits "All determinations required by the policy will be made by the FCIC," and cites 7 C.F.R. § 401.8(d)(19) (1988). The agency concludes by stating, "[T]he FCIC has reasonably interpreted its regulations to specify that the agency make all final determinations regarding *extent of crop loss*, and to require notice within ten

days for *total loss of crops...*" (emphasis added). Query, if the FCIC has the final say on all determinations regarding extent of crop loss, is not the August 23, 1988 notice timely? After all, it was not until this date that the FCIC deemed the Wilsons' rice crop a total loss.[*]

We will not answer our rhetorical question. Suffice it to say that after an independent review of the record, we are

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[*] In the cases cited by the FCIC regarding notice of loss, there are definite times or events set out in the policies which trigger the notice requirement. For example, in *Felder v. FCIC*, 146 F.2d 638 (4th Cir.1944), notice of loss was to be given when the crop was weighed, disposed of, or by January 21, 1943-whichever came first. If the crop was totally destroyed before these events, the loss date was to be determined by the FCIC. Similarly, in *Spratlin v. FCIC*, 662 F.Supp. 870 (E.D.Ark.1987), notice was to be given no later than thirty days from (1) harvest; (2) calendar date for the end of the insurance period; or, (3) the date the crops were destroyed *as determined by the FCIC*. *Id.* at 871 n. 1.

unconvinced that the Department of Agriculture is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Hartford Acc. & Indem. v. Costa Lines Cargo Serv.*, 903 F.2d 352, 362 (5th Cir.1990).

V. *Conclusion*

We REVERSE the decision of the district court to dismiss the Wilsons' FCIC claims, and REMAND this matter.[9] Because the decision of the ASCS was neither arbitrary or capricious, and was adequately supported by evidence in the

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[9] We do not reach the Wilsons' estoppel argument, which they have raised against the FCIC's decision. We will note, however, that the use of estoppel claims against the government is severely limited. *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 433, 110 S.Ct. 2465, 2476, 110 L.Ed.2d 387 (1990); *Rosas v. United States Small Business Admin.*, 964 F.2d 351, 360 (5th Cir.1992).

administrative record, we AFFIRM the dismissal of claims against the ASCS.

AFFIRMED in part; REVERSED and REMANDED in part.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4969

ELMER T. WILSON, SR. AND MAXINE WILSON,
Plaintiffs-Appellants

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendant-Appellee

Filed July 29, 1993

Before: JOLLY, DUHÉ, and BARKSDALE,
Circuit Judges.

ON PETITION FOR REHEARING

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

NO. 90-2252

ELMER T. WILSON, SR., et al, Plaintiffs

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, FEDERAL CROP INSURANCE CORPORATION and AGRICULTURAL STABILIZATION and CONSERVATION SERVICE, Defendants

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Filed August 24, 1992

Before: F. A. LITTLE, JR., United States District Judge

RULING

This case arose when Ernest and Maxine Wilson requested indemnity on 23 August 1988 from the Federal Crop Insurance Corporation and the Agricultural Stabilization Service for their failed rice crop. The loss was caused by one

inch of rain on or about 23 May 1988. Plaintiffs listed 11 July 1988 as the date of the loss. The Government filed a motion to dismiss the claims of the plaintiffs for failure to present their written notice within ten (10) days of the loss as required by the crop insurance policy and codified in 7 C.F.R. §401.8(d).

This court, in its ruling dated 13 April 1992, decided that because the timeliness of the loss was not raised at the administrative level, the Government should, in all equity, be barred from raising the issue at the federal court level. Upon careful reflection and review of the applicable regulation, this court must amend its prior judgment and conclude that the failure of the Wilsons to comply timely with the ten (10) day deadline bars their recovery under the insurance policy.

Opposing counsel has presented no jurisprudence to convince this court that the Government's motion to amend and alter the judgment of 13 April 1992 should not be GRANTED.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

NO. 90-2252

ELMER T. WILSON, SR., et al, Plaintiffs

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, FEDERAL CROP INSURANCE CORPORATION and AGRICULTURAL STABILIZATION and CONSERVATION SERVICE, Defendants

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Filed August 13, 1992

Before: F. A. LITTLE, JR., United States District Judge

RULING

On 23 August 1988, Ernest and Maxine Wilson requested indemnity for their failed rice crop from the Federal Crop Insurance Corporation (FCIC) and the Agricultural Stabilization and Conservation Service (ASCS). The Wilsons claimed that their loss was caused

primarily by one inch of rain on or about 23 May 1988 and listed 11 July 1988 as the date of the loss. This resulted in the seed germinating, swelling, and souring. Plaintiffs subsequently advised their insurance agent, Carolyn Drake, of the loss.

Initially, the district level of FCIC denied the Wilsons' claim for indemnity stating that the failure or their rice crop was due to improper farming practices. Later, the Washington, D.C. office of the FCIC overturned the district decision in part and held that the Wilsons sustained an insurable loss of 40% and were awarded $36,178.00. Ernest and Maxine Wilson filed suit on 9 October 1990 against the FCIC and the ASCS to recover the remaining 60%.

Before this court is a motion for summary judgment filed by the defendants, who seek the dismissal of all claims asserted by the plaintiffs. The defendants argue that the plaintiffs' claims should be dismissed (1) for failing to comply timely with the notice provisions of the rice crop insurance policy and the FCIC Program regulations and (2) for engaging in poor farming practices.

The plaintiffs filed the "Field Inspection and Claim for Indemnity" form on 23 August 1988 for their 1988 rice crop. In this form, they noted 11 July 1988 as the date of the loss. The primary cause of the loss was listed to have occurred on or about 23 May 1988. The defendants now argue that the plaintiffs failed to present their written claim for

indemnity within ten days of the loss as required by the insurance policy and codified in 7 C.F.R. § 401.8(d). the timeliness of the Wilsons' claim was apparently not raised as an issue at the administrative level and did not bar plaintiffs' 40% recovery on the policy. This court will not entertain a claim, made by defendants for the first time at the federal court level, that plaintiffs should be barred because they failed to comply with the regulations. This argument should have been made during one of the many administrative hearings and prior to the FCIC decision to award the plaintiffs partial recovery.

Rule 56 states that summary judgment is appropriate if there is "no genuine issue as to any material fact and that the moving party is entitled to summary

judgment as a matter of law." Fed. R. Civ. P. 56. A mere scintilla of evidence will not defeat a motion for summary judgment; there must be sufficient evidence upon which "a reasonaile jury could return a verdict for a nonmoving party."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 568-87 (1986). In their motion, the defendants argue that the remaining 60% loss was uninsurable under the provisions of the policy because the Wilsons engaged in poor farming practices. At the 28 June 1990 ASCS hearing, all of the defendants' witnesses agreed that the plaintiffs' "levees were not butted, and the rice was not flushed." They concluded that the failure to do

either of these was poor farming practice. Mr. Wilson, a rice farmer since 1956, along with other rice farmers from the area disputed the contention that flushing the rice and butting the levees were the only proper methods of farming rice. After a review of the ASCS hearing transcript, this court is convinced that there is a genuine question of material fact as to what constitutes good rice farming practice in this case. The defendants' motion for summary judgment is DENIED.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

NO. 90-2252

ELMER T. WILSON, SR., et al, Plaintiffs

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, FEDERAL CROP INSURANCE CORPORATION and AGRICULTURAL STABILIZATION and CONSERVATION SERVICE, Defendants

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Filed August 13, 1992

Before: F. A. LITTLE, JR., United States District Judge

JUDGMENT

For the written reasons assigned this date, the defendants' motion for summary judgment is DENIED.

APPENDIX F

REGULAR SESSION
CATAHOULA ASC COUNTY COMMITTEE MEETING

Time : 8:00 a.m.
Date : 5-24-90
Place: ASCS Office

Persons Present: W. D. Hackney, Jr., Vice-Chairman; Bertis Ray, Regular Member; Calvin Holly, Minority Advisor; William R. Bradley, CED; Ben Murphy; Dennis Clark; Sonny Stodghill; Billy Knox; Glenn Sullivan; Arnold Adcock; Elmer Wilson; John Hoychick

1. ADMINISTRATIVE

A. Minutes of 5-16-90 were approved as amended.

B. ASCS-134's - The committee approved time, travel and attendance records for the COC and CED.

C. The COC approved a within grade increase for William R. Bradley. This action was taken based on the committee's determination that the

CED's job performance was satisfactory.

D. Election Report - The CED reviewed with the committee the 1989 ASC Committee election results. The state average for voter turnout was 16.5 percent and Catahoula Parish averaged 23.2 percent.

E. High Water Report - The CED informed the COC that the Corp of Engineers in Vicksburg is predicting a crest of 49.5 on Black River at Jonesville Lock on 6-4-90. It will be late June and early July before planting is completed in the parish.

The CED pointed out that the Catahoula Emergency Board will again meet on Thursday, May 31, 1990, to evaluate crop conditions in the parish.

* * *

4. 1988 DISASTER PROGRAM

Elmer Wilson - Farm #1367 Failed 1988 Rice - On 6--22-88, Mike Cater representing Tensas Delta Land Co. filed an ASCS-578 reporting 1013.9 acres of rice on farm #1367. On August 25, 1988, rice tenant Elmer Wilson filed an ASCS-574 that he planted 135,000 lbs. of Lemont seed (3 bu/ac.) on May 13, 14 and 15, 1988. The Cater family was hired to custom disk the acreage and the seed was flown on by Kenny Flying Service out of Columbia, LA. Wilson hired Branstetter of Eudora, Arkansas to survey the levees. Mr. Wilson pulled the levees and set one pump in the field to lift the water. Wilson, also stated that he put out 4 lbs. of propenel per 10 gal. of water per acre. He stated that Homeland Bank in Columbia was financing the crop. He provided a list of

equipment used to produce the crop, and he informed the DED that he has produced rice for 32 years.

Mr. Wilson stated on the disaster application that on or about May 23, 1988, he started flushing the rice and at that time he received about 1 inch of rain causing some of the seed to sprout. On the 5th, 6th and 7th of July he received approximately 9 inches of rain which finished off his rice crop.

According to an FCIC report, Mr. Wilson applied for rice coverage on March 2, 1988, with Agent Carolyn P. Drake of Coushatta, LA. Agent Drake was contacted about crop conditions in June, 1988. FCIC made several visits to the acreage in August, 1988, to examine the crop and to make determinations about Mr. Wilson's farming practices.

In November, 1988, the crop insurance adjusters visited the acreage again and appraised the remaining rice. The CED read to the COC an FCIC Appeal Hearing Report from a meeting held in Washington, D. C. on August 15, 1989. The report stated that Agent Carolyn Drake, in a letter to Tensas Delta Land Co., which is landlord and shareholder said, " . . . Mr. Wilson called me in June, while he was flushing and told me that the fields were so cracked from the drought that the water seemed to go all the way to China. .. " Ms. Drake also stated in her letter the problems she and Mr. Wilson encountered in trying to get the local county agent to assist with the rice problem.

The report state that Leonard Terrell, FCIC Area Claim Specialist and various adjusters visited Mr. Wilson's

rice between August 4 and August 11, 1988. The report also states that the county agent, Rodney Ewing, had visited the fields and told Mr. Terrell, " . . . the rice levees had not been butted, no gates had been placed in the levees and he thought I would find the rice had not been flushed." The report went on to state that Mr. Terrell took Gene Boquet, assistant county agent for Franklin Parish to the field. Mr. Boquet was able to determine that adequate rice seed had been flown on, however, he stated that he did not believe it possible to flush rice, since the levees were not butted and no gates were in the levees.

Rodney Ewing, Catahoula Parish County Agent, met with the committee to discuss what he knew about Elmer Wilson's rice crop. Ewing stated that Elmer Wilson

contacted him and he met him at the farm on July 25, 1988. He said that the rice was 4" to 6" high and that it should have been laid by at that date. He also said that the levees were not butted and gates were not put in the levees. He said that this was July 25, and no gates were in the levees. Ewing pointed out that you must have gates to flood each patty. Ewing stated, "If you don't have gates you can't flood the rice patties." Committeeman Bertis Ray stated that his brother, Cloyce Ray has produced rice for a number of years and he always installed gates to flood the rice. The committee agreed that the rice levees must have gates to permit flooding of each patty. Therefore, it was not possible for Mr. Wilson to properly flush the rice beginning May 23, 1988. Also, this point is verified because the

rice was only 4" to 6" high on July 25, 1988, when the county agent Ewing visited the farm.

The COC discussed the fact that the rice had grown only 4" to 6" form the time Mr. Wilson flushed the rice on May 23, 1988 and when county agent Ewing inspected the field on July 25, 1988. The committee felt that if Mr. Wilson had made any effort to produce the crop it would have been more than 4" to 6" high. They felt that this verifies that no effort was made to produce a normal crop.

County Agent Ewing pointed out that he went to inspect the rice on August 2, 1988, with a Crop Insurance representative. He stated that he called Crop Insurance in Jackson, MS to get them to act on it timely to properly adjust the claim. Ewing also pointed out that it was

a poor farming practice to aerially seed Lemont rice. He said that if you cover it too much, then it will not come up.

After reviewing the field reports made by FCIC and the testimony presented by the Catahoula Parish County Agent, the committee ruled that Elmer Wilson did not carry out the necessary farming practices required to make a rice crop. The following findings were the basis for their decision.

1. Gates were not installed in the levees by July 25, 1988, therefore, there was no way possible that a rice crop could have been produced.

2. Aerially seeding rice does not constitute a proper planting practice for Lemont rice.

3. Disking the acreage twice and harrowing one third of the acreage does not constitute a good seedbed preparation.

4. Rice was only 4" to 6" high on July 25, 1988, which verifies that the rice was not properly cared for.

Based on this information, the committee ruled that Mr. Wilson did not carry out the necessary farming practices required to make a rice crop. Therefore, the committee, in accordance with HB 5PA, par. 607 and HB1-PAD, par. 92, reduced the rice yield to 0.

APPENDIX G

REGULAR SESSION
CATAHOULA ASC COUNTY COMMITTEE MEETING

Time : 8:00 a.m.
Date : 6-28-90
Place: ASCS Office

Persons Present: W. D. Hackney, Jr., Vice-Chairman; Bertis Ray, Regular Member; Calvin Holly, Minority Advisor; William R. Bradley, CED; Ben Murphy; Dennis Clark; Sonny Stodghill; Billy Knox; Glenn Sullivan; Arnold Adcock; Elmer Wilson; John Hoychick

1. ADMINISTRATIVE

* * *

5. 1988 DISASTER PROGRAM

A. Appeal of Disapproval of 1988 Rice Disaster Application on FSN: 1367. Elmer Wilson met with the committee to appeal their decision not to approve his 1988 failed rice application filed on farm #1367. Acting Chairperson, W. D. Hackney, Jr. welcomed Mr. Wilson, his attorney,

John Hoychick, and a group of six farmers, to the meeting. The acting chairperson provided Mr. Wilson and his attorney with a copy of the case summary for their review. Also, committeeman Hackney reviewed with the appellant 11B 1-PAD, par, 41A relative to specific issues under consideration and advised him to confine the presentation of facts and evidence to issues involved in the case. He also advised Mr. Wilson's attorney that the committee would allow the court reporter to tape the farmers' testimony. Committeeman Hackney informed the attorney that the transcript could not be used as an official transcript. He reminded them that an official transcript must be arranged by ASCS and made at the producers expense. Mr. Wilson's attorney stated that he understood and only wanted to

preserve the testimony of the farmers for future informational purposes.

Mr. Wilson stated that he and the group of rice farmers were here for the purpose of a friendly meeting to discuss his rice farming practices. He stated that they all carry out similar rice farming practices. Mr. Wilson said that they were not here in force, but rather to try and explain the practice of farming rice. He said that each year the same practices are not used to produce rice, and that it depends a lot on weather conditions. Mr. Wilson's attorney, John Hoychick, stated that this was not a courtroom and he was not trying to put anyone on the spot. It was noted by Mr. Hoychick that the Catahoula Committee was made up primarily of cotton farmers and

none of the committeemen actually produced rice.

Mr. Wilson went on to explain that as a normal practice he usually disked the acreage twice depending on the vegetation and sometimes he harrows the acreage. He said that the last 2 or 3 years he has found that it does better if he doesn't harrow. He likes the seedbed to be cloddy. He plants 135 lbs. per acre with an airplane and levees are surveyed on .2 of a foot. He went on to say that the levees end on high elevations, therefore, the levees don't need to be butted if there is a high place to end. The water would go around the levees before it would go through the levees. He pointed out that he plants and usually waits 10-20 days before flooding. He said to flush you must put the water on and off or the

rice will not come up. He stated that he was equipped to pump 57,000 gal. per minute and the pumps were in place and that he had flushed the rice by the 1st of June.

Relative to no gates in the levees, Mr. Wilson said that it had just been within the last few years that he has learned to use levee gates. He said that you must have a crew of men to install the gates. He stated that the only reason for using rice gates is to roll it up and hold the water longer. He said that for years he used only a shovel, and that if your don't use levee gates, one man can water the rice. He stated that the gates cost $10.00 per acre and that they are not essential to the farming practice.

Mr. Wilson said that County Agent Rodney Ewing did not go over all the field

during his visit. He went approximately 150 feet out into a 160.0 acre field. Ewing told Mr. Wilson that he was not a rice expert and he said he would give his findings in the mail.

The committee asked Mr. Wilson about the erosion problem created by cutting the levee without a gate. Mr. Wilson responded by saying that you don't have erosion problems when you are on a .2 tenth grade.

Mr. Wilson was asked if he had a normal crop on July 3, 4 and 5. He said considering the conditions it was about normal. He said the 18-19" of rainfall fell during the first few days of July and you could run a boat over his rice fields. The committee asked Mr. Wilson if it blew the levees out. Mr Wilson said no because the rain fell across the entire area and

it was days before the rain water ran off. He said rice must have oxygen or it will stretch and pull the roots out of the ground.

Committeeman Bertis Ray asked Mr. Wilson if he had put out any fertilizer. Wilson said that he puts fertilizer out at the first ring stage, therefore, he did not apply fertilizer. Also he said fertilizer is applied a 2nd time at the dime stage by splitting the joint to inspect the rice.

Mr. Hoychick asked the farmers appearing on Mr. Wilson's behalf if the practice Mr. Wilson carried out were considered normal for the area. Each producer stated that the farming practices Mr. Wilson carried out were considered normal and proper practices. The committee asked the producers if any of

them had a 100% loss in 1988. One of the producers had a complete loss and some of the other members of the group had a partial loss.

When asked about the FCIC claim, Mr. Hoychick informed the COC that FCIC approved 40% loss due to the heavy rainfall in early July, and that the balance was not covered because the policy excludes drought. Committeeman Hackney asked Mr. Wilson if they had any additional comments. There being none, they were excused from the meeting.

APPENDIX H

REGULAR SESSION
CATAHOULA ASC COUNTY COMMITTEE MEETING

Time : 8:00 a.m.
Date : 7-10-90
Place: ASCS Office

Persons Present: C. F. Routon, Jr., Chairperson; W. D. Hackney, Jr., Vice-Chairman; Bertis Ray, Regular Member; Calvin Holly, Minority Advisor; William R. Bradley, CED; Ernest L. Armstrong, DD; Leonard Terrell, FCIC Area Claim Specialist

* * *

4. 1988 DISASTER PROGRAM

A. Elmer Wilson - Farm #1367 - Failed Rice

Chairperson C. F. Routon, Jr., welcomed Leonard Terrell, FCIC Area Claim Specialist to the meeting. He thanked Mr. Terrell for attending the meeting and for his willingness to share with the committee information that he may have

relative to Elmer Wilson's 1988 rice crop on farm #1367.

Mr. Terrell provided the committee with a copy of Elmer Wilson's 1988 FCIC claim file. He informed the committee that he visited the farm with two FCIC appraisers and Mr. Wilson on August 4, 1988.

Mr. Terrell stated that Mr. Wilson drove them to various places in and around the field and they did not find enough rice to appraise. He stated that they did not see any levees butted or any gates installed. He said that Mr. Wilson showed them a 10-inch lift pump that he said would pump 5000 GAM and was used to flush the 300 acres. In addition, Mr. Wilson showed them a 30 inch discharge that was pulled by a caterpillar engine. He said

that it was used to flush the 700 acres and that it took 8 days to flush the rice.

Mr. Terrell pointed out that he visited with H. L. Poole who farms across the river from Mr. Wilson. Mr. Poole informed him that his son worked for Murrey Crowe who farmed across the turn row from Mr. Wilson's rice field. Mr. Poole said that after his neighbors started flushing their rice, he asked his son, who came by the Wilson field every day if Mr. Wilson had started flushing. Poole's son said the levees were built but he had not flushed the rice.

Mr. Terrell stated that on August 9, 1988, he, Garvin Wright, Jim Guice and Dr. Brad Guice checked the rice and could not find enough rice to appraise. He also said that the Tensas Delta representative

Mike Cater, did not know anything about the rice being flushed.

Mr. Terrell said that on August 11, 1988, he, Jim Guice and Franklin Parish County Agent Gene Boquet returned to the field. He said Mr. Boquet found some rice and this was in areas where water had stood. In one place they found rice in a twenty foot square. Another place where there was rice was next to the large pump station. Enough rice was found to determine that the rice was flown on.

County Agent Boquet, in a letter to Mr. Terrell on August 18, 1988, stated that during his examination of Mr. Wilson's rice field he determined that there was no evidence which showed that water could have been retained on the field during "flushing". In Mr. Boquet's opinion, because of the lack of levee

gates and levee design problems, there would have been no way to adequately flush this rice.

Mr. Terrell informed the committee that while he, Boquet and Jim Guice were in the field on August 11, 1988, Jim Guice talked to Ronnie Poole on the turn row beside the rice field. Mr. Poole said that the big well did not run on the rice field. He said it was started up and the water was used to water Murrey Crowe's soybean field.

Mr. Terrell said that he talked to Mike Cater who oversees the property for the landowner, Tensas Delta. He said that he asked Mr. Cater if he knew if the rice was flushed and he said he didn't know if the rice was flushed. Mr. Terrell said that he asked him how he could be overseeing such a large operation and not

know if the rice producer flushed the rice.

In closing, Mr. Terrell stated that he recommended that the claim not be paid.

Chairperson Routon thanked Mr. Terrell for taking time to attend the meeting and stated that the information he provided will be helpful to the committee in reaching a decision on the case.

The CED provided the committee with the Corps of Engineers rainfall and river stages collected in the area of Mr. Wilson's rice field. It was noted that the data from the Corps of Engineers did not confirm the 18-19 inches of rainfall Mr. Wilson Claimed he received the first week in July 1988. Therefore, the committee ruled that the rainfall received the first week of July 1988 did not destroy the crop. Also, based on the FCIC

appraiser's reports, the Corps of Engineers survey and Franklin Parish County Agent, Gene Bouquet's report, the committee determined that the rice acreage could not be properly flushed. Mark Mattox with the Corps of Engineers, stated in a letter to FCIC, that in their opinion, even though the terraces are constructed in an acceptable manner, it would be extremely difficult, if not impossible, to flush twenty to fifty acre fields without some minor grade adjustments. He stated that he saw no evidence of these adjustments.

The committee, in reviewing the Louisiana DD-50 Rice Management Program, determined that if Mr. Wilson planted on May 15, and finished flushing the rice somewhere about the last of May, as indicated by Mr. Wilson's claim statement,

then the rice should have emerged around June 10, and a permanent flood should have been established by the end of June. This should have put the rice at 6 to 10 inches high. However, when the FCIC claims specialist visited the farm around the first of August, he could not find enough rice to appraise.

The committee felt that if heavy rainfall destroyed the crop, then there should have been evidence to substantiate this claim when the FCIC Area Claim Specialist visited the farm on August 4, 1988. In his report, the Claim Specialist states that there was not enough rice to appraise. The committee feels that if the rice had been properly card for, then there would have been ample rice to appraise when Mr. Terrell made his visit,

or there would have been evidence of the rice destroyed by the rainfall.

The committee feels that there is no doubt that Mr. Wilson is knowledgeable of the proper methods used to produce rice. However, in this particular case, the committee determined that Mr. Wilson failed to carry out practices that are customarily performed to produce a crop. Therefore, they upheld their original decision to reduce the rice yield to zero and not approve Mr. Wilson's rice disaster claim on farm #1367.

* * *

APPENDIX I

FEDERAL RULE OF CIVIL PROCEDURE 56
SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in

the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although

there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in

controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sown or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented

or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered at against the adverse party.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this

rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.